

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
August 31, 2000 Session

**WILLIAM CRAIG BROWNING v. JAMES RIVER CORPORATION**

**Direct Appeal from the Chancery Court for Madison County  
No. 55033 Joe C. Morris, Chancellor**

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**No. W1999-01799-WC-R3-CV - Mailed June 11, 2001; Filed July 17, 2001**

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WIL V. DORAN, SP. J., dissenting.

I respectfully disagree with the decision of my fellow panel members.

It is true that the trial judge who heard and observed the witnesses testify is the arbiter of their credibility and if there are no compelling reasons to do otherwise, the reviewing court should defer to that judgment. Humphrey v. Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). This maxim is well grounded when there is a conflict between witnesses. However, when there are unreconciled conflicts in the testimony or other statements of a witness, where that witness could reasonably be expected to know and state the truth, it seems to me that the reviewing court is in as good position as the trial court to assess credibility.

Plaintiff testified that he was required to stand on concrete for twelve (12) hour shifts with no opportunity to sit down. When this testimony was disputed by several co-workers, Plaintiff admitted that his previous testimony was not correct (See Transcript Page 25 Volume 4).

Throughout Plaintiff's early direct testimony, he stated, if not directly at least by intimation, that when he was discharged from the Army and subsequently went to work for the Defendant there was nothing wrong with his feet or ankles. He was able to run five miles a day, play sports, and lead an active lifestyle. On cross-examination, he admitted that he was still having pain and discomfort in his feet and ankles when he was discharged from the Army and this condition persisted even up until the time he started working at James River Corporation. (See Transcript Volume 2 pp. 37- 38 and deposition of Dr. Warmbrod). It should also be noted that in his pre-employment physical for James River Corporation, Plaintiff did not inform the pre-employment physician that he had any problems with his ankles or feet.

The deposition testimony of the only treating physician, Dr. James Warmbrod, is telling:

- Q. Doctor, have you had an occasion to see a gentlemen by the name of William Craig Browning?
- A. I have.
- Q. And when did you first see Mr. Browning?
- A. On 2/7/96.
- Q. And what was he seeing you for at that time?
- A. For bilateral foot and ankle pain.
- Q. Did you take a history from him at that time?
- A. Yes.
- Q. What did that history reveal?
- A. **That he'd been having bilateral foot and ankle pain for about 10 years.** He said the right was worse than the left. He said he was in the Army, in the Airborne Rangers, did a lot of jumping, and he had repeated injuries to his foot and ankle. He said he would just tighten up his boot real tight and keep going. It gradually got worse. He was treated by the military physicians with medication, injections and inserts. Said they would sometimes put the injection in the medial side of his ankle and that would help, but they finally told him there wasn't anything else they could do for him, and he was discharged and also had some foot and ankle disability and also shoulder disability. They told him to take Motrin. He got a job thereafter where he stands all day, and his pain had gotten worse. He saw Dr. Randy Fly who's one of my partners, and Dr. Fly asked me to see him.
- Q. Did you perform a physical examination on him at that time?
- A. Yes.
- Q. And what did that reveal?
- A. That he had some pain over the medial side of both ankles, over the medial malleolus. He also had some pain over the plantar aspect of the foot, but he said his ankle pain was worse than the plantar pain.
- Q. Did you also review some X-rays or take some X-rays of Mr. Browning's feet and ankle?
- A. I reviewed some X-rays that Dr. Fly had made.
- Q. Of Mr. Browning's ankles?
- A. Right.
- Q. And what did those X-rays show?
- A. He had a plantar spur off of both calcaneus or heel bones.
- Q. Did he have any spurs anywhere else?
- A. I did not see any.
- Q. From those X-rays?
- A. No, sir.
- Q. And those X-rays, when were those taken? Do you know?
- A. I think they were made in December, December the 5<sup>th</sup>, '95.
- Q. Doctor, did those X-rays, based upon your review, reveal any spurs on the medial aspect of his ankles?
- A. No, sir.

- Q. Doctor, what was your opinion as to -- or what was your impression of his problem at that time?
- A. I thought he had chronic tendinitis on the medial side of his ankle and chronic plantar fasciitis. I also commented that he was overweight.
- Q. Did you recommend any treatment for him at that time?
- A. I told him he'd had this pain for ten years, and I did not have any -- I did not think surgery -- I had any treatment for him. I thought he needed -- because he'd had pain for ten years, that he needed to lose some weight and get in some type of job where he's not on his feet all day.
- Q. Did you have occasion to see him after that visit?
- A. I think I saw him back one more time.
- Q. And when was that?
- A. 4/10/96.
- Q. And what did that visit entail?
- A. We mainly discussed about his disability insurance. I think there was some kind of conflict that he wanted them to pay for his retraining, to pay that while he was getting retrained, and they did not want to do that. They said that he was capable of doing his job, and he and I both agreed at that time the he could do his job but that he would have pain if he did it. I still felt like he needed to get training in some type of job where he wasn't on his feet all day.
- Q. Did you ever see him after that visit?
- A. No, sir.
- Q. **Doctor, when you saw him the first time on February 7th of 1996 and you took that history from him, did he tell you at that time that he had -- before he started working at James River Corporation that he had had problems with both his feet and ankles?**
- A. **Yes, sir.**
- Q. **Both right and left?**
- A. **Yes, sir.**
- Q. **And was it at that time that he told you that the pain had just gradually gotten worse?**
- A. **Yes, sir.**
- Q. **In your opinion, Doctor, to a reasonable degree of medical certainty, did his employment at James River Corporation cause the chronic tendinitis or the chronic plantar fasciitis?**
- A. **No, sir.**
- Q. **Did his employment at James River Corporation cause any of the problems of which he was complaining to you on February 7th of 1996?**
- A. **I think it aggravated his pre-existing -- I mean, he already had the problem, and I think the fact that he was on his feet caused him to have pain, but I think he already had the problem before he started work there.**
- Q. **In your opinion, Doctor, to a reasonable degree of medical certainty, did his employment at James River Corporation in any way advance the condition of**

**his feet and ankles?**

A. **No, sir.**

Q. **Was it merely an increase in pain?**

MR. COBB: Object to the leading.

A. **Yes, sir.**

Q. **Doctor, in your opinion to a reasonable degree of medical certainty, did Mr. Browning sustain any permanent impairment as a result of his employment at James River Corporation based upon the AMA Guidelines, Fourth Edition?**

A. **No, sir.**

Even though Plaintiff has taken different positions, there seems to be little doubt that he had some fairly serious injuries to his ankles and feet at the time he was discharged from the Army and these problems persisted until the time he went to work for the Defendant.

The reviewing court is no longer bound by the findings of the trial court in workers' compensation cases, and it is obliged to review the record on its own to determine where the preponderance of the evidence lies and although deference must still be given to the trial judge when issues of credibility and weight of oral testimony is involved, the reviewing court is able to make its own independent assessment of the medical proof when the medical testimony is presented by deposition. Cleek v. Wal-Mart Stores Inc., 19 S.W.3d 770 (Tenn. 2000).

In order to be compensable, a claimant's injuries must have a rational causal connection to the work and in all but the most obvious cases, this must be established by competent and credible medical testimony. Neither the witnesses nor the court may speculate when determining these facts.

In the case under consideration, with regard to causal connection, I find the testimony of the treating physician, Dr. James Warmbrod, to be more credible than the testimony of the examining physician, Dr. Joseph C. Boals, III, which in my opinion, borders on speculation. Plaintiff's belated admission that he could sit down and take breaks just like his co-workers indicates that there was no event or condition peculiar to him that would cause injury to his feet. This makes Dr. Warmbrod's opinion that Plaintiff had a pre-existing injury and his job caused gradually increasing pain and discomfort, but did not cause or enhance the injury, even more plausible.

I am mindful of the fact that in workers' compensation cases, all doubts should be resolved in favor of the worker, but this does not obviate the requirement that Plaintiff prove every element of his case by a preponderance of the credible evidence. Owens Illinois, Inc., v. Lane, 576 S.W.2d 348 (Tenn. 1978).

After an in-depth examination of the record and for all of the above reasons I am constrained to say that, in my opinion, the evidence preponderates against the judgment of the trial court. Therefore, I respectfully dissent.

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WIL V. DORAN, SPECIAL JUDGE